

17

No. 108, Original

Supreme Court, U.S.

FILED

NOV 26 1991

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

**NEBRASKA'S MEMORANDUM IN OPPOSITION TO
MOTION OF BASIN ELECTRIC FOR LEAVE TO FILE
MEMORANDUM IN OPPOSITION TO NEBRASKA'S
MOTION FOR LEAVE TO FILE AMENDED PETITION
AND PROPOSED MEMORANDUM**

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

November 25, 1991

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
POINT I: Basin's Proposed Memorandum Would Bring No New Relevant Matters to the Attention of the Court	2
POINT II: Not Only Would Basin's Proposed Memorandum Not be Helpful to the Court, it Would Misdirect the Court's Attention	4
CONCLUSION	5

TABLE OF AUTHORITIES

P

Cases

Nebraska v. Wyoming, 325 U.S. 589 (1945),
modified, 345 U.S. 981 (1953) 3,

Statutes and Court Rules

Rule 37.1 of the Rules of the United States
 Supreme Court 1,

No. 108, Original
IN THE
Supreme Court of the United States
October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

**NEBRASKA'S MEMORANDUM IN OPPOSITION TO
MOTION OF BASIN ELECTRIC FOR LEAVE TO FILE
MEMORANDUM IN OPPOSITION TO NEBRASKA'S
MOTION FOR LEAVE TO FILE AMENDED PETITION
AND PROPOSED MEMORANDUM**

INTRODUCTION

On November 12, 1991, Basin Electric Power Cooperative ("Basin") moved for leave to file a memorandum brief in opposition to Nebraska's motion to amend its petition. Basin's motion for leave should be denied for two reasons. First, pursuant to Supreme Court Rule 37.1, Basin's proposed memorandum would not bring any relevant matter to the attention of the Court that has not been raised by a party to the proceedings. More importantly, pursuant to the rationale underlying Rule 37.1, Basin's motion should be denied not only because the memorandum would not be helpful to the Court, but on the contrary would serve only to mislead the Court through its flowery mischaracterization of the provisions of the existing Decree and Nebraska's amended petition.

ARGUMENT

Point I

Basin's Proposed Memorandum Would Bring No New Relevant Matters to the Attention of the Court

Rule 37.1 of the Rules of the Supreme Court states:

An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.

Aside from Basin's fundamental mischaracterization of the purpose of the existing Decree and Nebraska's amended petition, every point made by Basin in opposition to Nebraska's motion to amend is identical to a point made by Wyoming and/or Colorado.¹ Basin argues that the pending motion to amend is the same as that filed by Nebraska in 1988. Basin's Memorandum at 3-4. Wyoming and Colorado make the same, unfounded assertions in their briefs. Wyoming Brief at 12, 27-28; Colorado Brief at 2-4, 12-15. Basin argues that the Court should utilize the standard for decid-

¹The basic thesis of Basin's memorandum is that Nebraska is seeking an alteration of the existing apportionment. Excitedly, Basin argues that:

[Nebraska] contends that, since the entry to the decree, she has actually received more water than is apportioned to her; that she has found uses for such water from which 'equities' have sprung up; and that these equities should now be accommodated by altering the current apportionment.

Basin's Proposed Memorandum at 8. Nebraska does not contend that it has received more water than it was apportioned, beyond the operational waste that Special Master Doherty and the Court recognized would necessarily pass Tri-State Dam. We have not found overlooked uses from which equities have sprung up. And we most definitely are not seeking an accommodation which would "[alter] the current apportionment."

Basin's diatribe is designed to alarm the Court — to rouse the Court to vigilance over a landscape of windmills.

ing the issues on the merits in determining whether to grant the motion for leave to file the amended petition. Basin's Memorandum at 4-5. Wyoming makes the same argument. Wyoming Brief at 14-16. While Wyoming does not go quite so far, Basin argues that there is *no* unapportioned natural flow water above Tri-State Dam.² Basin's Memorandum at 6-7; Wyoming Brief at 16-19. Basin, Wyoming, and Colorado argue that the injury is speculative, ignoring the over-appropriated condition of the river. Basin's Memorandum at 7-17; Wyoming Brief at 16-26; Colorado Brief at 8-12. Finally, Basin reiterates Wyoming's and Colorado's arguments that resolution of the pending issues is a prerequisite to the consideration of the issues raised by the amended petition, albeit without indicating why.³ Basin's Memorandum at 17-20; Wyoming Brief at 19-24; Colorado Brief at 16.

In sum, the matters that Basin would bring to the Court's attention would simply burden the staff and facilities of the Court. Accordingly, Basin's motion for leave to file its memorandum should be denied because it would bring no relevant matter to the Court that is not already there. The proposed memorandum is needlessly repetitive.

²Wyoming asserts that Nebraska's attempt to have the presently unapportioned, non-irrigation season flows apportioned is disingenuous. According to Wyoming, "[t]here is an existing Decree and an existing apportionment that was intended to describe all of Nebraska's rights to demand natural flow of the North Platte River." Wyoming Brief at 18. As the Court has noted and Wyoming tacitly admits, the 1945 Decree apportions irrigation water only. *Nebraska v. Wyoming*, 325 U.S. 589, 608 (1945). In this regard, Basin's ridiculously radical interpretation of the Decree will be discussed in Point II, *infra*.

³Granting Nebraska's motion for leave to file its amended petition would in no way interrupt the resolution of issues raised by the pending cross-motions for summary judgment. The Special Master's recommendations and the Court's ultimate decision would only provide guidance for the apportionment of the non-irrigation season flows, which would happen in due course in any event.

Point II

Not Only Would Basin's Proposed Memorandum Not be Helpful to the Court, it Would Misdirect the Court's Attention

Basin's most egregious assertion is that Nebraska's motion for leave to apportion the non-irrigation season flows is without merit because there is no unapportioned natural flow:

The major premise of Nebraska's instant motion for leave to amend her petition, that the existing decree does not apportion all of the natural flow of the river originating above Tri-State, is patently fallacious. The decree . . . leaves none of the natural flow unapportioned during either the irrigation season or non-irrigation season.

Basin's Memorandum at 6. The only support for Basin's assertion is an allusion to the Court's statement in 1945 that "all water in the stream except storage water" was apportioned. *Nebraska v. Wyoming*, 325 U.S. 589, 670 (1945). With a curious indifference to gravity, Basin argues that "[a]n imperative of the very structure of the decree is that all natural flow water originating above Tri-State that is apportioned neither to Colorado nor to Nebraska is apportioned to Wyoming."⁴ Basin's Memorandum at 7. Basin concludes its argument by imagining that Nebraska's true motive — lurking "behind a phantasm of the existence of 'unapportioned' water" — is to obtain an alteration of the existing apportionment.

We respectfully submit that Basin needs a rest. Precisely what is and what is not apportioned by the Decree is set out paragraph by paragraph in Nebraska's amended petition. *Ibid.* at 2-5. Neither Basin, Wyoming, nor Colorado has attempted to dispute the provisions of the Decree or their

⁴Contradicting itself, Basin first asserts that "none of the natural flow [is] unapportioned," and then that the natural flow that is unapportioned must belong to Wyoming. *Id.*, at 6 and 7.

factual underpinnings. Paragraph V of the Decree, which apportions the natural flow, is limited to "[t]he natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year. . . ." 325 U.S. at 667. During the non-irrigation season, *i.e.*, October 1 to April 30, the *unapportioned* inchannel inflows to Nebraska from Wyoming averaged 197,400 acre feet annually, 1946-1987. In prefacing the Court's opinion in 1945, Justice Douglas was not irresponsibly argumentative when he stated that "[t]he controversy pertains to the use for irrigation purposes of the water of the North Platte River. . . ." 325 U.S. at 591. Nor did his tongue slip when he concluded that damage had been clearly proven principally because the "natural flow of the river *during the irrigation season* [had] long been over-appropriated." *Id.* at 608 (emphasis added). In sum, the "phantasm" that ostensibly animates Nebraska's amended petition is the case as it was presented, decided, and decreed in 1945.

CONCLUSION

It is clear that the only relevant matters that Basin would like to bring to the Court's attention in its proposed memorandum have already been brought to the Court's attention by Wyoming, Colorado, or both. The other matter that Basin wishes to discuss is clearly irrelevant because it grossly mischaracterizes the existing Decree and Nebraska's amended petition. Accordingly, pursuant to Supreme Court Rule 37.1, Basin's motion for leave to file its proposed memorandum should be denied.

Respectfully submitted,

DON STENBERG

Attorney General of Nebraska

Department of Justice

State Capitol

Lincoln, Nebraska 68509

(402) 471-2682



RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN
Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Sante Fe, New Mexico 87504
(505) 983-3880

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that true and correct copies of the foregoing Nebraska's Memorandum in Opposition to Motion of Basin Electric for Leave to File Memorandum in Opposition to Nebraska's Motion for Leave to File Amended Petition and Proposed Memorandum were served this 25th day of November, 1991, on each of the following parties:

The Honorable Owen Olpin (Federal Express)
Special Master, United States Supreme Court
O'Melveny & Myers
400 South Hope Street
Los Angeles, California 90071-2899

Ms. Saone B. Crocker (Federal Express)
Beveridge & Diamond, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005

Ms. Nancy E. McFadden (Federal Express)
O'Melveny & Myers
Suite 500 West
555 13th Street, N.W.
Washington, D.C. 20004-1109

The Honorable Michael J. Sullivan
Governor of Wyoming
State Capitol
Cheyenne, Wyoming 82002

The Honorable Joseph B. Meyer
Attorney General of Wyoming
Wyoming Office of the Attorney General
State Capitol, Room 123
Cheyenne, Wyoming 82002

Mr. Dennis C. Cook (Federal Express)
Senior Assistant Attorney General
Wyoming Office of the Attorney General
State Capitol, Room 123
Cheyenne, Wyoming 82002

Mr. Charles N. Woodruff (Federal Express)
Moses, Wittemyer, Harrison & Woodruff, P.C.
1002 Walnut Street, Suite 300
Post Office Box 1440
Boulder, Colorado 80302

The Honorable Roy Romer
Governor of the State of Colorado
136 State Capitol Building
Denver, Colorado 80203

The Honorable Gale A. Norton
Ms. Lois G. Witte
Ms Wendy Weiss (Federal Express)
Attorney General's Office
Natural Resources Section
110 Sixteenth Street, 10th Fl.
Denver, Colorado 80202

The Honorable Kenneth W. Starr
 United States Solicitor General
 Mr. Jeffrey P. Minear
 Office of the Solicitor General
 Constitution Avenue & Tenth Street, N.W.
 Washington, D.C. 20530

Mr. Andrew F. Walch
 U.S. Department of Justice
 Land & Natural Resources Division
 1961 Stout Street
 Post Office Box 3607
 Denver, Colorado 80294

Ms. Patricia L. Weiss (Federal Express)
 U.S. Department of Justice
 General Litigation Section
 Land & Natural Resources Division
 Post Office Box 663
 Washington, D.C. 20044-0663

Mr. William E. Holland
 Chadbourne & Parke
 30 Rockefeller Plaza
 New York, NY 10112

Mr. Abbe David Lowell (Federal Express)
 Brand & Lowell
 923 Fifteenth Street, N.W.
 Washington, D.C. 20005

Mr. Peter A. A. Berle
 Mr. John D. Echeverria
 National Audubon Society
 666 Pennsylvania Avenue, S.E.
 Washington, D.C. 20003

Ms. Hope Babcock (Federal Express)
 National Audubon Society
 Georgetown Law Center
 600 New Jersey Avenue, N.W.
 Washington, D.C. 20001

Mr. William Madden (Federal Express)
Counsel of Record for Nebraska Public
Power District
Winston & Strong
1400 L. Street, N.W.
Washington, D.C. 20005-3502

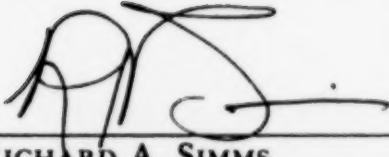
Mr. Gary Bachman (Federal Express)
Counsel of Record for Central Nebraska
Public Power & Irrigation District
VanNess, Feldman, Sutcliff & Curtis
1050 Thomas Jefferson Street, N.W.
Washington, D.C. 20017

Mr. Michael C. Klein
Central Nebraska Public Power &
Irrigation District
Anderson, Klein, Peterson & Swan
Post Office Box 133
Holdrege, Nebraska 68949

Mr. Edward Weinberg (Federal Express)
Counsel of Record for Basin
Electric Power Cooperative
Duncan, Weinberg & Miller, P.C.
1615 M Street, N.W., Suite 800
Washington, D.C. 20036

Mr. Michael J. Hinman
Mr. Claire Olson
Basin Electric Power Cooperative
1717 East Interstate Avenue
Bismarck, North Dakota 58501

Melinda Taylor
Henry, Kelly & Lowerre
2103 Rio Grande
Austin, Texas 78705



10

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

